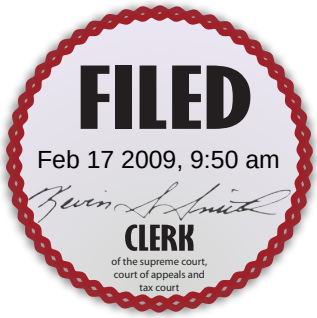

ATTORNEY FOR APPELLANT:

JOHN PINNOW
Special Assistant to the
State Public Defender
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DANNY HOWELL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 90A02-0809-PC-829
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0505-PC-2

February 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Danny Howell appeals the denial of his petition for post-conviction relief. Howell argues that the post-conviction court erroneously determined that he did not receive the ineffective assistance of trial counsel. Finding no error, we affirm.

FACTS

The underlying facts, as described by another panel of this court in Howell's direct appeal, are as follows:

> In the summer of 2002, Howell met his future wife Lorrinda Howell ("Lorrinda") through the internet. Lorrinda had a thirteen-year old daughter named B.S. Lorrinda married Howell in the fall of 2002, and she and B.S. moved into Howell's home in Bluffton, Indiana. After moving in with Howell, B.S.'s grades began to drop and she exhibited behavior problems. Lorrinda allowed Howell to discipline B.S. Howell usually disciplined B.S. by yelling at her or grounding her. B.S. was also made to do a significant amount of chores around the house.
>
> B.S. testified that in March of 2003, while B.S. was thirteen years old, Howell began coming into her room at night. Howell would take the covers off of B.S. and then touch B.S. between her legs near her crotch. Howell did not touch B.S. underneath her clothes. B.S. indicated that the touching would usually last for a minute or two, during which Howell did not speak. B.S. testified that this sort of touching occurred on approximately fifty different occasions between March and June of 2003. B.S. did tell Lorrinda about the touching, but Lorrinda took no action to prevent this from happening again.
>
> B.S. testified that in late June of 2003, while B.S. was still thirteen years old, Howell again came into her room at night. Howell proceeded to take the covers off of B.S. and then took off her pants and underwear. Howell then got in bed on top of B.S., and she noticed that he was completely naked. Howell placed his penis in B.S.'s vagina and had sex with her for about two minutes. Although she could not remember the exact date, B.S. testified that Howell had sex with her a second time while she was still thirteen years old.

> On July 13, 2003, the day after B.S.'s fourteenth birthday, Howell again had sex with B.S.
>
> Debra Evans, Lorrinda's friend, testified that she visited Howell's home five or six times and saw Howell touch B.S. in ways that she believed were inappropriate. Evans discussed this with Lorrinda, but Lorrinda refused to take any action. When she believed that she had collected sufficient information, Evans called the police in July of 2003, and reported that Howell was molesting B.S.
>
> During July of 2003, Officer Greg Steele of the Bluffton Police Department and Wendy Garrett of the Wells County Office of Family and Children had three interviews with B.S. In the course of these interviews, B.S. revealed that Howell had molested her. Based on these interviews, on October 9, 2003, the State charged Howell with child molesting as a Class A felony and sexual misconduct with a minor as a Class B felony. The State also filed an habitual offender charge against Howell.
>
> At the request of the Victim's Assistance Office, B.S. met with social worker Ted Ramsey five times. During these meetings B.S. discussed how Howell molested her. B.S. also alleged that Howell's son, B.H., [FN 1] had molested her.
>
> > [FN 1.] B.H. was Howell's son from an earlier marriage. At the time, B.H. was sixteen years old. During the time that B.S. lived in Howell's home, B.H. would visit his father every other weekend. During these visits, B.H. would spend the night.
>
> On April 14, 2004, a pretrial hearing was held. At this hearing, the State filed a motion in limine asking the trial court to exclude any evidence relating to B.S.'s past sexual conduct. The State argued that this evidence was inadmissible pursuant to Indiana's Rape Shield Statute, Indiana Code section 35-37-4-4. The trial court granted the State's motion in limine.

Howell v. State, Cause No. 90A02-0407-CR-571, slip op. p. 2-4 (Ind. Ct. App. Apr. 13, 2005). On April 30, 2004, a jury found Howell guilty of class A felony child molesting and class B felony sexual misconduct with a minor and Howell was also found to be a

habitual offender. On May 11, 2004, the trial court sentenced Howell to thirty years for child molesting, ten years for sexual misconduct with a minor, and enhanced the child molesting sentence by thirty years, for an aggregate executed term of seventy years imprisonment.

Howell appealed his convictions and sentence directly, arguing that the trial court had improperly permitted the State's expert witness to testify, improperly excluded evidence of an alleged sexual relationship between B.S. and B.H., and imposed an inappropriate sentence. On April 13, 2005, this court affirmed the trial court's judgment in an unpublished memorandum decision. Id.

On June 21, 2006, Howell filed an amended petition for post-conviction relief.[1] On April 15, 2008, the post-conviction court held a hearing on Howell's petition. The parties submitted proposed findings of fact and conclusions of law, and on August 29, 2008, the court denied Howell's petition. In relevant part, the post-conviction court found as follows:

> . . . [Howell] alleges that he was denied effective assistance of trial counsel because his trial counsel made no offer of proof at the trial regarding the admission of evidence concerning alleged sexual activity between the victim and the defendant's minor son. . . . Prior to the trial, the State filed a motion in limine to prohibit [Howell] from making reference to the alleged consensual sexual activity between the victim and the defendant's minor son. Citing Rule 412 of the Indiana Rules of Evidence, the Court granted said motion in limine. Subsequently, at the trial, [Howell's] attorney made no offer of proof regarding the allegation of consensual sexual activity between the victim and the defendant's minor son. . . .

[1] Howell had initially filed a pro se petition for writ of habeas corpus on May 15, 2005, which the post-conviction court deemed to be a petition for post-conviction relief.

. . . [Howell] believe[s] that answers to questions at the trial by a State expert witness, "opened the door" for admissions of evidence of the alleged consensual sexual activity between the victim and the defendant's minor son. . . .

***

1. Evidence of alleged consensual sexual activity between the victim and the defendant's minor son was not admissible . . . because it was prohibited by Rule 412 of the Indiana Rules of Evidence.

***

3. At the hearing . . . , [Howell] cited the case of Stewart v. State (1994) 636 N.E.2d 143 to support his position that testimony of the State's expert, Ted Ramsey, "opened the door" to admission of [the] evidence . . . ; however, this case (Howell v. State) is distinguished from Steward v. State for the following reasons:

    a) In Stewart . . . , the evidence sought to be admitted was that the victim was molested by four (4) other men, while in Howell . . . , the evidence sought to be admitted was that the victim had consensual sex with another minor child; and

    b) In Steward . . . , the State's expert testified that the victim displayed abnormal behavior that was indicative of the victim having been molested, while in Howell . . . , the State's expert never testified as to any such behavior by the victim.

4. The case of Steward . . . was the only case cited by [Howell] at his amended post-conviction relief hearing that was in effect at the time of the trial in this case.

***

6. Even if the evidence . . . would have somehow been admissible at the trial herein, failure of [Howell's] counsel to make an "offer of proof" as to said evidence would not have been so prejudicial as to deprive [Howell] of a fair trial for the following reasons:

    a) [Howell] presented no evidence at the hearing . . . that he had any trial witnesses available that would have testified

> that alleged consensual sexual activity between the victim and another minor child would cause any behaviors of the victim consistent with molestation by [Howell]; and
>
> b) The balance of the evidence presented by the State at [Howell's] trial was so overwhelming that [Howell] would have been convicted even if the State's expert . . . did not testify.

Appellant's App. p. 8-12. Howell now appeals.

DISCUSSION AND DECISION

I. Standard of Review

As we consider Howell's argument that the trial court erroneously denied his petition for post-conviction relief, we observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

Here, Howell argues that he received the ineffective assistance of trial counsel. When evaluating a claim of ineffective assistance of counsel, we apply the two-part test

articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

II. Offer of Proof

Howell argues that his trial attorney was ineffective for failing to make an offer of proof regarding the alleged sexual relationship between B.S. and B.H. Although he concedes that this evidence would normally have been inadmissible pursuant to Indiana Evidence Rule 412,[2] Howell insists that Ramsey's testimony opened the door to the

[2] In relevant part, Rule 412 provides as follows:

> (a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:
>
> (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
>
> (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
>
> (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or

evidence, implicating Howell's right to cross-examine witnesses pursuant to the Sixth Amendment to the United States Constitution.

Ramsey was a social worker who interviewed B.S. on five separate occasions. During these sessions, B.S. discussed Howell's molestation and may have also mentioned her alleged sexual relationship with B.H. At Howell's trial, Ramsey testified about his counseling sessions with B.S.:

> Q. I'm going to ask you very specific questions and please try to stay within the perimeters of the questions I ask you. Do you believe that [B.S.] has the ability to know and understand acts that may have happened to her?
>
> A. Yes I do. . . . .
>
> Q. Do you perceive any indication that [B.S.] may have fabricated the story of her abuse because of some psychological or emotional need?
>
> A. No I do not.
>
> ***
>
> Q. Is it unusual for child molest victims as a whole not to resist when the act of sexual abuse is occurring?
>
> A. Not . . . it's more common than it is uncommon. It's very rare in fact for children to resist. Even children that are twelve, thirteen, fourteen, fifteen. It's very unusual for them to resist.
>
> Q. Is it unusual for child molesting victims as a whole not to scream out or yell for help when the act of abuse is occurring?
>
> A. Not unusual. . . . [V]ery common for them not to.

---

(4) evidence of conviction for a crime to impeach under Rule 609.

Evid. R. 412(a).

Q. Is it unusual for child molesting victims as a whole not [to] confide in family members or anybody else about what's going on?

A. Again that's more the rule than it is the exception . . .

***

Q. Is it unusual for child molesting victims as a whole to be confused about details of the molesting?

A. Yes, many times they don't remember the details . . . .

Q. So if a child molesting victim as a whole doesn't remember specific details that other people remember, that's not unusual?

A. Not unusual.

***

Q. Do you believe [B.S.] is prone to exaggeration in sexual matters?

A. No I didn't find any evidence of that at all.

Q. Did you learn anything about [B.S.] that would be inconsistent with the victim being a victim of sexual abuse?

A. No not at all.

Q. Has [B.S.'s] version of the events since you began meeting with her . . . from the time you stopped remained consistent?

A. Very consistent . . . .

Trial Tr. p. 250-53. Howell argues that, notwithstanding Rule 412 and the order in limine, Ramsey's testimony opened the door to the admission of evidence of the relationship between B.S. and B.H.:

> Ramsey's testimony was offered to corroborate B.S.'s and the State's allegation B.S. had sexual contact, and Danny Howell was the perpetrator. The State by offering Ramsey's testimony opened the door to impeachment evidence that a specific perpetrator other than Danny Howell was responsible for B.S.'s psychological condition. Here, the State opened the door to impeachment evidence

> B.S. had been sexually active with her older stepbrother B.H. when she was thirteen years old. That evidence would have been admissible on whether she was prone to fabricate or exaggerate in sexual matters, whether her inability to recall details of being molested by Howell was because she was confusing such details with her sexual activities with B.H., and whether her version of events that she was a victim of sexual abuse meant she had been abused by her older stepbrother, Howell[,] or by both of them.

Appellant's Br. p. 11.

Howell directs our attention to Steward v. State as support for his contention that the evidence would have been admissible. 636 N.E.2d 143 (Ind. Ct. App. 1994), aff'd in relevant part, 652 N.E.2d 490, 499-500. In Steward, the defendant was charged with five counts of child molesting. At trial, the State offered expert testimony that the victim, S.M., had exhibited changed behaviors consistent with victims of child abuse, such as low self-esteem, guilt, depression, and a decline in school performance, and that S.M. exhibited improvement following disclosure of the molestation. Id. at 146-47.

This court found that the testimony was properly admitted into evidence but also held that it was fundamental error to have prevented the admission of exculpatory evidence that, at the same time S.M. disclosed Steward's molestation, she made accusations that four other individuals had molested her as well. In considering whether the trial court's decision to exclude that evidence denied Steward's Sixth Amendment right to cross-examination, this court engaged in the following analysis:

> . . . In partial corroboration, once there is evidence that sexual contact did occur, the witness's credibility is automatically "bolstered." Tague [v. Richards, 3 F.3d 1133, 1138 (7th Cir. 1993)]. . . .

> In other words, the risk of partial corroboration arises when the State introduces evidence of the victim's physical or psychological condition to prove that sexual contact occurred and, by implication, that the defendant was the perpetrator. Once admitted, such evidence may be impeached by the introduction through cross-examination of specific evidence which supports a reasonable inference and tends to prove that the conduct of a perpetrator other than the defendant is responsible for the victim's condition which the State has placed at issue. . . .
>
> Here, in order to prove that sexual contact occurred, the State introduced expert testimony that S.M.'s behavior was consistent with that of other victims of child sexual abuse syndrome. More importantly, the State produced evidence that S.M.'s manifestations of child sexual abuse syndrome improved once she reported that Steward had molested her and that a victim of child sexual abuse often improves after identifying the molester. This evidence does more than suggest inferentially that Steward caused S.M.'s condition; it is more than partial corroboration. It is evidence offered to prove that it was Steward who molested S.M. As a result of the State's evidence, the suggested inference is that the improvement in S.M.'s behavior was directly attributable to the defendant's absence from her presence. Thus, when the State presented evidence of S.M.'s behavior which actually linked the sexual contact to Steward and supported the inference that Steward was the perpetrator, the State opened the door to Steward's introduction of exculpatory evidence through cross-examination, limited to the scope of direct examination on that issue.

Id. at 149-50 (emphases in original). Finding that the exclusion of the evidence of prior molestations through cross-examination, which prohibited Steward from proving that there was another possible explanation for S.M.'s behavior, was a violation of his Sixth Amendment right of cross-examination, this court reversed Steward's conviction on the count of child molesting to which the evidence would have been relevant.

We find Steward easily distinguished from the case at hand. First, Howell offered no evidence at the post-conviction hearing that the relationship between B.S. and B.H.

was anything other than consensual. Moreover, he offered no evidence that a consensual sexual relationship would have caused B.S. to have behaved as though she had been molested. As put by the State, "there was no evidence that B.S. ever confused the acts of molestation committed by [Howell] with her sexual relationship with B.H." Appellee's Br. p. 8.

In any event, unlike in Steward, Ramsey did not testify that B.S. exhibited behaviors consistent with a victim of child molestation or that her behavior improved or changed after she disclosed the molestation. To the contrary, Ramsey merely testified that it is not unusual for victims of child molestation to refrain from resisting, to refrain from screaming for help, to refrain from confiding in family members about the molestation, and to be confused about the details of the molestation. As to B.S. specifically, he stated that he had no reason to conclude that she had fabricated her allegation, that she is not prone to exaggeration in sexual matters, that her version of events remained consistent, and that nothing about B.S. was inconsistent with being a victim of sexual abuse.

Unlike in Steward, this evidence was not "evidence of the victim's physical or psychological condition to prove that sexual contact occurred and, by implication, that the defendant was the perpetrator." 636 N.E.2d at 149. We cannot conclude that this evidence opened the door to testimony regarding a sexual relationship between B.S. and B.H. because Howell's Sixth Amendment right to cross-examination was simply not implicated. Cf. Tague, 3 F.3d at 1138-39 (holding that, where State introduced evidence that child molestation victim's hymen had been damaged to prove that sexual contact had

occurred, defendant was entitled to rebut the evidence by showing another possible source of the hymenal damage); Davis v. State, 749 N.E.2d 552, 555-56 (Ind. Ct. App. 2001) (holding that, where the State introduced physical evidence that the twelve-year-old victim had engaged in sexual intercourse, defendant was entitled to introduce evidence that she had had sexual partners other than him to rebut the inference that he had raped her). Under these circumstances, therefore, we cannot say that Howell's trial counsel was ineffective for failing to make an offer of proof regarding the sexual relationship between B.S. and B.H.

Furthermore, we note that even if we had concluded that an offer of proof should have been made, Howell would still fail in his ineffective assistance claim because he cannot establish prejudice given the substantial evidence in the record supporting his convictions. B.S. testified that Howell had engaged in sexual intercourse with her twice when she was thirteen and again when she was fourteen. Furthermore, four witnesses testified that they saw Howell pat B.S.'s legs inside her thigh, pat her bottom with his fingers between her legs, place his crotch area on her hand, and press the front of his body against B.S.'s bottom. Trial Tr. p. 196-98, 209, 312-14, 223, 234-37. We do not find the post-conviction court's conclusion that this evidence is "overwhelming" to be clearly erroneous. Appellant's App. p. 12. Therefore, we find that it was not clearly erroneous for the post-conviction court to have concluded that Howell established neither deficient performance nor prejudice, thereby denying his claim for post-conviction relief.

The judgment of the post-conviction court is affirmed.

NAJAM, J., and KIRSCH, J., concur.